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No. 81-32

IN THE

Supreme Court of the United States

October Term, 1980

Mosher Steel Company, Petitioner,

V.

Raymond J. Donovan, Secretary of Labor, Et Al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The only matter that requires further discussion is the Secretary's suggestion that this case is moot, which he relies on both as a reason in itself for denying certiorari (pp. 4-5) and as a basis for distinguishing the Seventh Circuit's decision in the *Weyerhaeuser* case (p. 10).

The question of mootness was not discussed in our original Petition for the best of all possible reasons. The Petition was filed on July 7, 1981. It was not until July 24th, the Brief in Opposition advises the Court, that the Secretary withdrew the citation (p. 5).

Although the Secretary's tactic was not unforeseen by petitioner (Pet., p. 12 n. 11), surely this Court will not allow it to prevail. The Secretary persuaded the Fifth Circuit to deny judicial review by asserting that petitioner had an adequate administrative remedy, with review in the courts available after the agency had ruled. 642 F.2d at 773. Even now the Secretary undertakes to defend the correctness of the decision below by saying that this is not a case in which there is no available administrative remedy (p. 7). But now, confronted by an opponent with the tenacity and the money to seek review here, the Secretary dismisses the citation and asserts that by doing so he can avoid either administrative or judicial review. This is what "the late Francis H. Bohlen would call 'carrying a good joke too far.' " *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 83 (3d Cir. 1948).

But the Fourth Amendment is no laughing matter and this case is no joke. OSHA inspectors come out with an invalid warrant, achieve entry by force, and for three days carry on an extensive search "to make an example" of petitioner (Pet., pp. 4-6). When they find they have taken on an opponent who will not roll over and play dead, government officials seek by skillful timing to avoid any

review, either judicial or administrative, of what their people have done.

The doctrines of mootness have more than their share of complexities and uncertainties, but there is nothing in them that suggests that judicial review of important issues can be defeated by so cynical and transparent a tactic. E.g., *Quern v. Mandley*, 436 U.S. 725, 733 n. 7 (1978); *S.E.C. v. Sloan*, 436 U.S. 103, 108-110 (1978); *Dow Chemical Co. v. United States Environmental Protection Agency*, 605 F.2d 673, 677-680 (3d Cir. 1979); *Nader v. Volpe*, 475 F.2d 916 (D.C.Cir. 1973); 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3533, at pp. 282-291 (1975).

The writ of certiorari should be granted and the parties directed to brief and argue the question of mootness as well as the substantive questions presented by the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was mailed to all Counsel of Record the 29th day of September, 1981.

Robert E. Rader, Jr.